ISSUED JANUARY 23, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

TRUYEN DANG DO dba The New Island Market 711 Fourth Street Coronado, CA 92118, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6631 File: 20-287942 Reg:. 95033476 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: October 2, 1996 Los Angeles, CA

Truyen Dang Do, doing business as the New Island Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellant's off-sale beer and wine license for 40 days, with 15 days thereof stayed for a probationary period of one year, for appellant's clerk selling alcoholic beverages (wine coolers) to an 18-year-old police decoy, being contrary to the universal and generic public welfare and morals provision of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Truyen Dang Do, appearing through his counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control,

[1]The decision of the Department, dated January 18, 1996, is set forth in the appendix.

appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on September 24, 1993. Thereafter, the Department instituted an accusation against appellant's license on August 5, 1995. Appellant requested a hearing.

An administrative hearing was held on December 11, 1995, at which time oral and documentary evidence was received. At the hearing, it was determined that appellant's clerk, Dinh Van Nguyen, sold alcoholic beverages consisting of a four-pack of wine coolers, to Shannon M. Hembera, an 18-year-old who was acting as a police decoy for the Coronado Police Department at the time of the sale.

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for 40 days, with 15 days thereof stayed for a probationary period of one year. Appellant filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) the Department's guidelines for the use of minors as decoys were not followed, as a consequence of which appellant's clerk was entrapped; (2) the decision is not supported by its findings and the findings are not supported by substantial evidence; and (3) the penalty was excessive.

DISCUSSION

I

The Administrative Law Judge (ALJ) made a factual determination (Finding of Fact III (4)) that the claimed failure of the Department to follow its own Decoy Program Guidelines was irrelevant in determining whether alcoholic beverages were sold to a minor.

The issue, then, is whether the Department's own, informal, guidelines are binding on the Department or law enforcement authorities where the decoy operation was otherwise in compliance with the formal requirements as set forth in section 141 of Title 4 of the California Code of Regulations (Rule 141). Appellant has not claimed a lack of compliance with Rule 141.

Before a guideline, bulletin, rule or order can be enforced by a state agency, it must first be adopted as a regulation and filed with the Secretary of State pursuant to Government Code section 11340.5. This has not been done with respect to the Department's guidelines. It follows, then, that these informal guidelines may not be enforced against the Coronado Police Department.

This decoy operation was conducted by a police officer employed by the City of Coronado. Although the police officer was accompanied by two investigators of the Department, appellant's counsel was successful in excluding any testimony by such investigators on the ground that their identity had not previously been made known to appellant's counsel. The testimony of one of these representatives had already commenced, but was stricken pursuant to agreement between counsel [RT 32]. As a consequence, there is no direct evidence that this particular decoy operation was one under the control of the Department, rather than the Coronado Police Department.

Rule 141, adopted January 2, 1996, and operative February 1, 1996, reflects the teachings of the decision of the Supreme Court in Provigo Corporation v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638], and provides essentially the same protections as the Department's informal guidelines. There is no contention that the requirements of Rule 141 have not been satisfied. The elements set forth in the Department's informal guidelines would appear to be intended to assist local law enforcement agencies by suggesting extra safeguards against possible procedural abuse, and not to narrow the authority of either the Department or law enforcement agencies. Thus, unless the Board is to hold law enforcement authorities to a higher standard than those set forth in Rule 141 simply because Department representatives may have been present as observers or potential witnesses, which we are not inclined to do, this contention must be rejected. However, as the Board has recognized on previous occasions, if the Department's guidelines, which are only suggestions, are not followed, the Appeals Board will scrutinize the facts with greater care to ensure that principles of due process and fair play have not been contravened.

The facts underlying appellant's challenge regarding the Department's alleged failure to comply with its guidelines can be summarized as follows:

(a) Guideline - PRIOR NOTIFICATION

Appellant contends that no notice was given in advance of the decoy operation. Although the ALJ made no finding as to this contention, concluding that the Department's guidelines were irrelevant, there is evidence which could have supported a finding that notice was sent.

The ALJ admitted into evidence, over objection, a letter (Exhibit 7) which was

sent by the Coronado Police Department, on the basis of testimony of the police officer that a copy had been sent to all off-sale licensees in the City of Coronado. The letter stated that the Coronado Police Department had been and was continuing to monitor sales to minors, and reminded the licensees of their obligations under the law. Appellant denied receipt of any such letter.

Even though the evidence could be said to be in conflict as to whether there was prior notice, it does not seem that the absence of such necessarily gives rise to unfairness. Appellant has a duty to comply with the law without being reminded to do so. Further, although the evidence offered to authenticate the document claimed to constitute prior notice is, arguably, weak, there was no evidence offered to suggest that it was a fabrication.

(b) Guideline - GENERAL APPEARANCE OF PERSON WELL UNDER 21

Appellant contends that a photograph of the minor decoy depicts the general appearance of a person who looks well over 21 years of age. The ALJ found to the contrary. Appellant simply wants the Board to substitute its judgment for that of the ALJ who personally saw both the photograph and the minor.

(c) Guideline - MAKEUP

Appellant claims that since the decoy wore lipstick, she thereby presented a more mature-looking appearance, and the clerk was entrapped into making the sale. This issue is discussed in greater detail below in connection with appellant's other principal claim of entrapment, that the minor intentionally distracted the clerk by initiating a conversation. Of course, it is well-known that teen-age girls wear lipstick and still reflect a youthful appearance and age that could be verified by a simple request for identification .

(d) Guideline - INITIATION OF CONVERSATION

Appellant contends that the decoy intentionally distracted the clerk by focusing his attention on a television program rather than on the business at hand. The minor decoy denied any such intention [RT 52]. The "conversation," in its entirety, consisted of the comment "Aren't those ladies beautiful?" and was with reference to a beauty contest the clerk was viewing on the store television.

Appellant relies on language from People v. Barraza (1979) 23 Cal.3d 675, 690 [53 Cal.Rptr. 459], referring to "overbearing conduct such as badgering, cajoling, importuning or other affirmative acts likely to induce a normal law abiding person to commit the crime."

The clerk who made the sale did not testify, and appellant, who did testify, said nothing to the effect that his clerk was distracted by the decoy's remark. Thus, the claim that the clerk was distracted by the decoy's single remark is unsupported by any record evidence. Nor is there any claim that the decoy engaged in any other conduct or conversation intended to badger, cajole or importune the clerk to make the sale, the sort of conduct that would be improper under the teachings of People v. Barraza, supra.

Appellant also contends that because the decoy wore lipstick, she appeared older than 21.

In Provigo Corporation v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638], the Supreme Court discussed Barraza in the context of an unlawful sale to a minor decoy. The Court specifically ruled that the use of mature-looking decoys did not constitute entrapment. "Such a practice would not rise to the level of 'overbearing" conduct needed to constitute entrapment . . ." (Provigo, supra, 7 Cal.4th at 569). Thus, even assuming that the use of lipstick made the decoy

appear older than she was, this would not appear to contravene either Rule 141 or principles of fairness. "The seller may readily protect itself by requiring sales agents to routinely check identification." (Provigo , supra, 7 Cal.4th at 569 [28 Cal.Rptr.2d 638].) In any event, it should be noted that the minor who was the decoy testified at the hearing, and the ALJ had an opportunity to compare her then appearance to that in a photograph offered by appellant which was taken the night of the decoy operation. The ALJ found as a fact that her appearance at the time of her testimony was substantially the same as her appearance at the time of the sale and that "she had a youthful looking appearance and it would be reasonable to ask her for identification to verify that she could legally purchase alcoholic beverages." (Finding of Fact III-1.)

(e) Guideline - CONSTANT SUPERVISION AND SURVEILLANCE

Police Officer Kline admitted that when the minor decoy was in the store he could not observe what she was doing. However, aside from the unsupported claim of distraction caused by the alleged conversation (a single remark by the minor), there is no claim of any conduct or misconduct in any way relevant to the fact that the police officer did not personally see the transaction. Officer Kline saw the minor enter the store, and emerge with her purchase a few minutes later. The marked money was found in the store register. There is no claim that the minor was not the person who made the purchase, or that some other patron was the source of the marked $5 bill. Unless constant supervision and surveillance is construed to mean the minor must remain within the direct vision of the police officer during every second, there would appear to have been substantial compliance with this requirement.

II

Appellant contends that the Department's decision is not supported by

substantial evidence.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456], and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board after considering the entire record, must determine whether there is substantial evidence even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]. Appellate review does "not resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr. 658].)

Appellant's contention that there is no substantial evidence to support the findings of the ALJ is premised on his claim of misconduct which, appellant contends, led to the sale in question. Thus, if the Appeals Board determines, as we do, that there is no merit to the misconduct charges (the alleged failure to follow the Department's informal guidelines), this argument falls of its own weight. Appellant also contends that the ALJ improperly received in evidence the "buy" money (Exhibit 4) and the unsigned letter from the Coronado Police Department (Exhibit 7). As to Exhibit 4, the ALJ ruled it admissible after counsel for the Department pointed out that appellant's counsel had been given notice concerning the use of "buy" money in the police officer's report. Exhibit 7 was also admitted after the police officer testified that such a letter had

been sent out. The admissibility of these two documents, and the weight given them, rested with the ALJ.

Appellant asserts that, since no chemical analysis was performed on the liquid contents of the bottles seized after the sale in question, there was no evidence or testimony that the bottles contained alcohol. This is incorrect. The bottles were identified as "Bartles and James" wine coolers, consisting of cold, sealed labeled bottles in a four-pack container [RT 42, 56]. The Board has addressed this issue on prior occasions, stating that sealed containers are presumed to contain that which the labels state they contain. (Georggin (1991) AB-6030.) Cases which support such a presumption include Mercurio v. Dept. of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474] and People v. Minter (1946) 73 Cal.App.2d 944 [167 P.2d 11]. Appellant cited no authorities to the contrary, nor any evidence which might refute such a presumption.

The misconduct defense, once rejected as not supported by the evidence, is tantamount to an admission that the violation occurred. "But for the gross misconduct involved in this decoy operation, there would have been no sale of alcoholic beverages to this deceptive minor ... ." (App. Br. 11-12.) However, the Board does not have to rely on an admission. The evidence of a violation is overwhelming.

III

Appellant contends that the suspension of his license for a net of 25 days is cruel and unusual punishment under the United States Constitution, both because it is disproportionate in relation to the offense charged, and because it is based on a record "replete with government misconduct."

The Appeals Board will not disturb the Department's penalty orders in the

absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The ALJ found that the offense established at the hearing was the third of its kind in less than two years. (Finding of Fact V.) As the Department notes in its brief, under recent amendments to the Business & Professions Code, the license could have been revoked. However, the Department also took into consideration, as an element of mitigation, appellant's testimony that the clerk who made the sale was fired because it was his second offense. (Finding of Fact III.)

Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

CONCLUSION

The decision of the Department is affirmed.

RAY T. BLAIR, JR.,CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD